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SYMPOSIUM: INTERNATIONAL LAW BARES ITS TEETH: HOW STATES AND INTERNATIONAL ORGANIZATIONS ENFORCE CUSTOMARY NORMS AND INTERNATIONAL AGREEMENTS

INTRODUCTION

JUSTIN T. CARLSON*

I. INTRODUCTION

A threshold question facing all students of international law is whether international law actually exists. Some professors pose the question to their classes merely to provoke critical thought of the inherent limitations in creating and enforcing a legal framework to govern behavior throughout the entire world. Others genuinely doubt whether international law exists and question whether international law amounts to more than aspirational norms that any state or individual actor can violate if it has enough power. The query often segues into discussion of other critical topics including state sovereignty, international organizations, the use of force, and the sources and limitations of basic political, economic, and social rights.

With this question in mind, the staff of the American University International Law Review (AUILR) decided to look at a critical component in assessing any body of law: its enforceability. Legislators and jurists, highly conscious of public

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perception of their power and authority, often establish statutory and common law they are reasonably confident can be put into force. Why, then, does international law suffer such a deficit in this arena? Do the drafters of conventions shoot for the stars when establishing idealistic norms to protect human rights and, in so doing, frustrate their whole purpose? Does the idea of state sovereignty inherently prevent any effort at creating binding global obligations?

In our annual symposium the staff of AUILR convened four panels to pose these and other questions to experts in international human rights, criminal law, and commercial law. One panel addressed domestic enforcement of international norms through the lens of the U.S. legal system's struggle over how to legally detain terrorists. Finally, our keynote speaker discussed international law enforcement in the context of police cooperation and extradition. Each of our panels was moderated by a faculty member from the American University Washington College of Law (AUWCL). The symposium identified enforcement mechanisms in each broad area of international law, and detailed the relative strengths and weaknesses of those mechanisms.

This issue contains two articles by symposium panelists. First, the Honorable Patricia Wald writes an article examining international cooperation in apprehending war criminals. Second, Professor David Baluarte writes an article dissecting the enforceability of decisions in the Inter-American Court of Human Rights. This brief introduction provides biographical information about both authors and the other panelists who attended our symposium. It also provides a brief synopsis of the panel topic and discussion. All the biographical information is accurate to the time of the symposium in February 2011. All of the summaries are the interpretation of the author and are not intended to impute a position upon the panel or any panelist.

II. COMPLIANCE WITH AND ENFORCEMENT OF INTERNATIONAL HUMAN RIGHTS LAW

Our first panel of the day addressed the protection of human rights by governments, international organizations, NGOs, and

other actors. Panelists discussed sources of authority for enforcing the norms established by human rights treaties and widespread practice. Specific application of these mechanisms was assessed through the lens of the Inter-American system of human rights.

The panel was moderated by Claudio Grossman, Dean of the American University Washington College of Law and an expert on international law, human rights, and Inter-American affairs. Dean Grossman was unanimously elected chair of the United Nations Committee against Torture in April 2008, where he has been a member since 2003 and previously served as vice chair (2003-2008). Previously, he was a member of the Inter-American Commission on Human Rights from 1993-2001, where he served in numerous capacities including twice as its President (1996 and 2001) as well as the special rapporteur on the rights of indigenous populations and the special rapporteur on women's rights. He has participated in numerous on-site visits and election-observing missions in Eastern Europe, Latin America, and the Middle East. He has also worked on international legal issues with the United Nations and the International Human Rights Law Group.

The first speaker was Professor David Baluarte. Professor Baluarte is a Practitioner-in-Residence in the International Human Rights Law Clinic (IHRLC) at the American University Washington College of Law. An alumnus of the Washington College of Law ('05), Professor Baluarte came to the IHRLC in 2009 from the Immigration Unit of the U.S. Federal Court of Appeals for the Second Circuit, where he wrote recommendations to judges in cases involving asylum and Convention against Torture relief. Before that, Baluarte was a staff attorney at the Center for Justice and International Law (CEJIL), an organization specializing in litigation and advocacy before the Inter-American Human Rights System, where he was in charge of CEJIL's U.S. and Caribbean docket and various advocacy initiatives before the political bodies of the Organization of American States. He has recently acted as the lead researcher on a project with the Open Society Justice Initiative on the implementation of the decisions of human rights tribunals, and previously worked as a consultant for the London-

based Equal Rights Trust, researching and reporting on the detention of stateless persons under U.S. authority. This research culminated in the publication of the report "From Judgment to Justice: Implementing International and Regional Human Rights Decisions," which can be accessed at: [http://www.interights.org/view-document/index.htm?id=](http://www.interights.org/view-document/index.htm?id=606)

606.

The second speaker was Maria McFarland. Ms. McFarland is the Deputy Washington Director of Human Rights Watch, where she conducts advocacy before the U.S. government on a wide array of global human rights issues, including, in particular, matters related to the Middle East and North Africa, South Asia, and Central Asia. Previously, as Senior Americas Researcher for Human Rights Watch, she investigated human rights abuses in Latin America, serving as the organization's primary expert on Colombia's internal armed conflict and working on international justice matters, including the extradition and trial of former Peruvian President Alberto Fujimori. McFarland has conducted extensive advocacy before the governments of the United States, Canada, and European and Latin American countries; has authored and edited numerous Human Rights Watch reports; has testified before the U.S. Congress and Canadian Parliament, and is a frequent voice in the media. Before joining Human Rights Watch, McFarland engaged in sovereign litigation as an attorney at an international law firm, taught human rights law, and clerked on the U.S. Court of Appeals for the Fifth Circuit.

The third speaker was Anne Gallagher, an international legal Practitioner and scholar working in the areas of human rights and criminal justice. She served as a UN official from 1992 until 2003 – for the last four years as Adviser to Mary Robinson, the High Commissioner for Human Rights. She continues to work as a consultant to various UN agencies including OHCHR, the UN Office for Drugs and Crime, and the UN Population Fund. Dr Gallagher is recognized as a leading global authority on the international law and policy of human trafficking. She was involved in the drafting of the UN Convention on Transnational Crime and its protocols on Trafficking and Smuggling and led the process develop the UN Principles and Guidelines on Human

Rights and Human Trafficking. Since 2003 Dr Gallagher has directed a major regional initiative aimed at strengthening criminal justice responses to trafficking in the ten ASEAN Member States (www.artipproject.org). Dr Gallagher has taught at academic institutions throughout the world including the NATO Staff College, the European Institute for Human Rights and universities in Australia, Finland, Switzerland and Thailand. She has published extensively in the areas of criminal justice, human rights, and human trafficking in journals including Human Rights Quarterly and the Virginia Journal of International Law (http://works.bepress.com/anne_gallagher/). Her most recent book, *The International Law of Human Trafficking*, was published by Cambridge University Press in October 2010.

Our fourth and final panelist was Francisco Quintana, Deputy Program Director for the Andean, North America and Caribbean Region, Center for Justice and International Law. Mr. Quintana received his law degree from Universidad Nacional Autónoma de Mexico in Mexico City and his LLM from the London School of Economics and Political Science. Between 2001 and 2003 Mr. Quintana served as staff attorney at CEJIL's office in Costa Rica, litigating cases related to Honduras and Panama and providing training to NGOs in the Central American region. Between 2004 and 2006, he also served as senior staff attorney at the Inter-American Court of Human Rights in San Jose.

III. MUST U.S. COURTS ENFORCE AMERICA'S INTERNATIONAL AGREEMENTS? A DISCUSSION OF *AL-BIHANI V. OBAMA*

Our second panel addressed the enforcement of international law within a domestic system through the case study of the American application of international humanitarian law to its detention of terrorists. The panelists discussed the recent D.C. Circuit decisions in *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010), and *Al-Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010) (mem.). In *Al-Bihani I*, the Circuit Court held that the laws of war (and international law more generally) do not limit the scope of the President's detention power under the September 2001 Authorization for the Use of Military Force (AUMF), even though

the Supreme Court may have suggested otherwise in prior precedent. Though the D.C. Circuit declined to rehear the case in *Al-Bihani II*, the opinions concurring in the denial demonstrate the divergent viewpoints on this issue. The panelists seized on the diverging views of the judges to support their positions in a spirited debate on the applicability of the Geneva Conventions in constraining the behavior of the United States and its armed forces.

Our second panel was moderated by Professor Robert Goldman. Goldman is a Professor of Law and co-director of the Center for Human Rights and Humanitarian Law at the American University Washington College of Law. From 1996 to 2004 he was a member of the Organization of American States' Inter-American Commission on Human Rights, and its president in 1999. From July 2004 to July 2005, Goldman was the UN Human Rights Commission's Independent Expert on the protection of human rights and fundamental freedoms while countering terrorism. In October 2005, the International Commission of Jurists named him one of the eight jurists on the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights. In 2008, Goldman was elected Commissioner and member of the Executive Committee of the International Commission of Jurists. He is author of *The Protection of Human Rights: Past, Present and Future* (1972); coauthor of Middle East Watch's book, *Needless Deaths in the Gulf War*, a 1991 publication that assessed civilian casualties during the 39-day air campaign and assigned responsibility for violations of the laws of war; and coauthor of *The International Dimension of Human Rights: A Guide For Application in Domestic Law* (2001).

Our first speaker was Professor Steven Vladeck. He is a Professor of Law at American University Washington College of Law and a nationally recognized expert on the role of the federal courts in the war on terrorism. He was part of the legal team that successfully challenged the Bush Administration's use of military tribunals at Guantánamo Bay, Cuba, in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), and has co-authored amicus briefs in a host of other lawsuits challenging the U.S. government's surveillance and detention of terrorism suspects. Vladeck has also drafted reports on related issues for a number

of organizations, including the First Amendment Center, the Constitution Project, and the ABA's Standing Committee on Law and National Security. Professor Vladeck is a senior editor of the peer-reviewed *Journal of National Security Law and Policy* and is a regular contributor to *PrawfsBlawg*, <http://www.prawfs.com>. While a law student, he was Executive Editor of the *Yale Law Journal* and the Student Director of the Balancing Civil Liberties & National Security Post-9/11 Litigation Project.

Our second speaker was Devon Chaffee. Ms. Chaffee is an Advocacy Counsel in the Washington D.C. office of Human Rights First, where she advocates for U.S. counter-terrorism and national security policies that respect human rights. In this role, she has served as an observer to the military commissions proceedings in Guantánamo Bay, Cuba, testified before the Helsinki Commission on the laws prohibiting cruel interrogation, and is a co-author of a joint Human Rights First/Physicians for Human Rights report *Leave No Marks: Enhanced Interrogation Techniques and the Risk of Criminality*. While in law school Devon interned with the Documentation Center of Cambodia in Phnom Penh, the Committee on Conscience at the U.S. Holocaust Memorial Museum, and the Center for Applied Legal Studies-Asylum Clinic, and she interviewed Darfurian refugees in Eastern Chad as part of a U.S. State Department investigation. Devon received her J.D. magna cum laude from Georgetown University Law Center (2006) where she was a Public Interest Law Scholar and her B.A. from Hampshire College (2001) in International Relations and Human Rights.

Our third and final speaker was Professor Neomi Rao. Ms. Rao is a Professor of Law at George Mason University. Prior to joining the George Mason faculty in 2006, Professor Rao served as Associate Counsel and Special Assistant to President George W. Bush. Professor Rao also served as counsel to the United States Senate Committee on the Judiciary, where she was responsible for judicial nominations and constitutional law issues. In between government service, Professor Rao practiced in the London office of Clifford Chance LLP, specializing in public international law and commercial arbitration. Professor Rao received her J.D. with high honors from the University of Chicago, and her B.A. from Yale University. She clerked for Judge J. Harvie

Wilkinson III of the U.S. Court of Appeals for the Fourth Circuit and for Justice Clarence Thomas of the U.S. Supreme Court. Professor Rao is a member of the Virginia State Bar and a Qualified Solicitor of England and Wales.

IV. KEYNOTE ADDRESS – THE LEGAL FRAMEWORK FOR INTERNATIONAL LAW ENFORCEMENT COOPERATION

Our keynote address was delivered by Samuel M. Witten. Mr. Witten is Counsel at the DC office of Arnold & Porter, where he is a member of the International Arbitration and National and Homeland Security practice groups. Mr. Witten represents domestic and international clients in litigation and arbitrations and in domestic enforcement and regulatory matters, and counsels clients on compliance with the Foreign Corruption Practices Act. He served in the State Department's Office of the Legal Adviser for 19 years, including six years as Deputy Legal Adviser and five years as Assistant Legal Adviser for Law Enforcement and Intelligence. While at the State Department Mr. Witten testified as an Administration expert witness before the Senate Foreign Relations Committee on numerous treaties, including the Council of Europe Cybercrime Convention; the UN Convention Against Corruption; and dozens of bilateral treaties between the United States and other governments for international cooperation on law enforcement matters. He also supervised the State Department's international extradition program and coordinated the support provided by the State Department Legal Adviser's Office for U.S. Government investigations and prosecutions of violations of U.S. criminal law.

Mr. Witten's shared his experience while at the State Department legal office from 1994 to 2007. During that time he was directly involved with international law enforcement cooperation, helping to develop bilateral and multilateral treaties facilitate cooperation between nations' law enforcement, police, investigators and prosecutors. These law enforcement treaties covered a range of functions including extradition, corruption, investigative and prosecutorial cooperation, and human trafficking. Mr. Witten gave specific examples of how

such treaties are negotiated. He said that comity is sometimes it is not enough between government, that treaties and binding standards from the United Nations and other sources provide critical frameworks for cooperation.

V. THE INVISIBLE HAND WIELDS A TRANSNATIONALS STICK: THE ENFORCEMENT OF OBLIGATIONS ARISING UNDER INTERNATIONAL INVESTMENT AND TRADE LAW

Our third panel discussed international commercial law, which the AUILR staff identified as the most likely area of international law where enforcement successfully takes place. The panelists quickly put that hypothesis to rest. They discussed the myriad of challenges in enforcing international trade agreements, the complexity of international commercial arbitration, and the process of bilateral dispute resolution between the United States and Iran in the 1980s.

The panel was moderated by Professor Padideh Alai'i. Ms. Alai'i is Professor of Law at American University, Washington College of Law where she specializes in areas of international trade law and development and comparative legal traditions. In private practice Professor Alai'i represented developing country governments, including Guyana, Nicaragua, Uganda, China and the Philippines in their negotiations with foreign investors, the U.S. Government and its federal agencies, as well as multilateral institutions such as the World Bank. She also represented multinational corporations in international business transactions and advised them on pending U.S. banking legislation. From 1992-1996, Professor Alai'i was part of the legal team representing the Government of Philippines in international litigation and arbitration against Westinghouse Corp. charging corruption and bribery by Westinghouse of former Philippine President Ferdinand Marcos and defective construction of the Bataan nuclear power plant.

Our first speaker was Dr. Stacie I. Strong. Dr. Strong is Associate Professor of Law at the University of Missouri School of Law. She previously taught at the University of Cambridge and

the University of Oxford in the United Kingdom. Her work on multiparty arbitration, particularly international class arbitration, has received acclaim nationally and internationally and is cited as authority in papers submitted to the United States Supreme Court. In addition to her scholarly work, Professor Strong has extensive experience as a practicing lawyer qualified in New York and Illinois and as a solicitor in England and Wales. During her years in practice, she handled complex commercial disputes involving both private parties and state and other public entities in U.S. and English courts. She also represented clients in bilateral and multi-lateral arbitrations seated in a wide variety of jurisdictions and proceedings under the auspices of the Permanent Court of Arbitration (PCA), the International Chamber of Commerce (ICC), the International Centre for Dispute Resolution (ICDR), the London Court of International Arbitration (LCIA) and the American Arbitration Association (AAA), as well as ad hoc arbitrations under the UNCITRAL Arbitration Rules. Professor Strong currently serves as an arbitrator and mediator, and is included on the national and international rosters of various arbitral organizations, including the AAA Commercial Panel and the Financial Industry Regulatory Authority (FINRA).

Our third speaker was Dr. Tamara Takacs. Dr. Takacs lectures at the Utrecht University School of Law (Netherlands) in European Union Law and International Economic Law. She holds a PhD from Utrecht University School of Law, received her law degree from the University of Pécs (Hungary), and a Master's Degree in European Union Law (D.E.A in Droit Communautaire) from Université Nancy 2 (France). In the Spring semester of 2011 she is an Adjunct Professor at Washington College of Law and teaches Introduction to European Union Law. She has published extensively on the application of EU law in the Member States and on promotion of labour standards in the EU's external trade policy.

Our fourth and final speaker was Professor Srilal Perera. Mr. Perera is an Adjunct Professor at WCL and the former Chief Counsel of Multilateral Investment Guarantee Agency (MIGA). Prior to his appointment with MIGA, Mr. Perera served from 1986-1989 as an attorney at the Iran-United States Claims

Tribunal in the Hague, where he assisted the President of the Tribunal. Mr. Perera, has many years of operational experience in MIGA and in advising governments of countries in Asia, Africa and East Europe on investment related laws. Mr. Perera has extensive experience working with multilateral organizations such as the Colombo Plan, United Nations Development Programme (UNDP), and the World Bank. Mr. Perera received his LL.B. from the University of Sri Lanka. He earned his Masters Degree in International Affairs at the School of Advanced International Studies (SAIS) of Johns Hopkins University, in 1977, and completed his Ph.D. in Georgetown University, Washington, D.C. in 1985, with concentration on international economic law.

VI. FROM INVESTIGATIONS TO SENTENCING: STATE COOPERATION WITH THE ICC IN ENFORCING INTERNATIONAL CRIMINAL LAW

Our fourth and final panel discussed the historical origins and current state of the International Criminal Court.

The panel was moderated by Ms. Susana SáCouto, Director, War Crimes Research Office. Ms. SaCouto is Professorial Lecturer-in-Residence at WCL, where she teaches courses on gender and human rights law and on the responses of international humanitarian law and international criminal law to women affected by conflict. She is also Director of the War Crimes Research Office (WCRO), which promotes the development and enforcement of international criminal and humanitarian law, and Director of WCL's Summer Law Program in The Hague. Prior to joining the WCRO, Ms. SáCouto directed the Legal Services Program at Women Empowered Against Violence (WEAVE), clerked for the Office of the Prosecutor at the International Criminal Tribunal for the former Yugoslavia (ICTY) and worked with the Center for Human Rights Legal Action in Guatemala. She currently serves as co-chair of the Women's International Law Interest Group of the American Society for International Law (2006-2009 term), and was recently awarded The Women's Law Center 22nd Annual Dorothy Beatty Memorial Award for significant contributions to women's rights. From

1999 to 2002, she co-chaired the Immigration and Human Rights Committee of the DC Bar's International Law Section.

Our first speaker was the Honorable Patricia Wald. Judge Wald served for twenty years on the U.S. Court of Appeals for the District of Columbia (1979-1999), including five years as Chief Judge (1986-1991). She is a member of the American Law Institute (1973-present), was elected to its council (1978-present), served as a vice president (1988-1993 and 1993-1998), and is an advisor to the Model Penal Code, Sentencing Project (2001-present). Judge Wald is a member of the American Philosophical Society (2000-present), and serves on the Open Society Institute's Justice Initiative Board (2002-present), including two years as chair (2002-2004). Judge Wald was a member of the President's Commission on the Intelligence Capabilities of the U.S. Regarding Weapons of Mass Destruction (2004-2005), served as a judge on the International Criminal Tribunal for the former Yugoslavia (1999-2001), and was a member of the Executive Board of the American Bar Association's Central European and Eurasian Law Initiative (CEELI) (1994-1999). Prior to serving on the U.S. Court of Appeals for the District Court of Columbia, Judge Wald was the Assistant Attorney General for Legislative Affairs at the Department of Justice (1977-1979).

Our second speaker was Sara Criscitelli. Ms. Criscitelli is prosecution coordinator for the Office of the Prosecutor (OTP) in the International Criminal Court. She supervises the trial and appellate attorneys in the Prosecution Division, prepares or reviews all OTP filings, and coordinates legal policies within the OTP on key issues. Prior to joining the Office of the Prosecutor, Ms. Criscitelli worked in the Criminal Division of the U.S. Department of Justice in several capacities, including as assistant director of the Office of International Affairs, and was part of the US team that negotiated the Rome Treaty and the Rules of Procedure and Evidence. She also taught international criminal law for several years as an Adjunct Professor, George Washington University Law School. Ms. Criscitelli earned her BA degree from Queens College and her law degree from Hofstra University School of Law.

Our third and final speaker was Professor Diane Orentlicher. Ms. Orentlicher is the Deputy for the Office of War Crimes Issues for the U.S. Department of State. The Office of War Crimes Issues, led by Ambassador-at-Large Stephen Rapp, advises the Secretary of State directly and formulates U.S. policy responses to atrocities committed in areas of conflict and elsewhere throughout the world. The Office of War Crimes Issues coordinates U.S. Government support for war crimes accountability in the former Yugoslavia, Rwanda, Sierra Leone, Cambodia, Iraq, and other regions where crimes have been committed against civilian populations on a massive scale. The office works closely with other governments, international institutions, and non-government organizations, and with the courts themselves, to see that international and domestic war crimes tribunals succeed in their efforts to bring those responsible for such crimes to justice.

VII. CONCLUSION

We would like to thank all of the panelists who donated their time to participate in the annual symposium. Our hope is that the symposium spurred thought and discussion as to the enforceability of international law.